IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TITUS FUGAH, Petitioner,	:	
v.	:	CIVIL ACTION
J.F. MAZURKIEWICZ, and THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents.	:	NO. 96-7272

MEMORANDUM & ORDER

YOHN, J. April ____, 2005

Presently before the court is state prisoner Titus Fugah's amended petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 ("amended petition") and amended application for relief pursuant to Fed. R. Civ. P. 60(b)(6) ("amended motion"). United States Magistrate Judge Diane M. Welsh filed a comprehensive and very thorough report and recommendation ("report and recommendation") recommending denial of the amended petition and the amended motion, and petitioner filed objections to the report and recommendation ("objections"). For the following reasons, I will overrule petitioner's objections, adopt the report and recommendation, and deny the amended petition and the accompanying amended Rule 60(b)(6) motion.

I. BACKGROUND[1]

On October 13, 1993, following a jury trial in the Philadelphia Court of Common Pleas, petitioner was convicted of robbery, criminal conspiracy, and reckless endangerment. The court sentenced petitioner to twelve to twenty-four years imprisonment on January 13, 1994. On direct appeal, the Pennsylvania Superior Court affirmed the trial court's judgment on July 3, 1995, *see Commonwealth v. Fugah*, 667 A.2d 418 (Pa. Super. Ct. 1995) (table), and the Pennsylvania Supreme Court denied *allocatur* review on December 4, 1995. *See Commonwealth v. Fugah*, 668 A.2d 1123 (Pa. 1995) (table).

On October 23, 1996, at the earliest,[2] petitioner filed a timely petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this court. The petition was "mixed" because it contained some claims that petitioner failed to raise on direct appeal in state court.[3] *See Rose v. Lundy*, 455 U.S. 509, 514 (1982) ("[A] mixed petition contain[s] both exhausted and unexhausted claims.") Consequently, on December 12, 1997, I dismissed the petition without prejudice for failure to exhaust state court remedies. *See Fugah v. Mazurkiewicz, et al.*, No. 96-7272, 1997 U.S. Dist. LEXIS 19789, at *21 (E.D. Pa. Dec. 12, 1997); *see also Rose*, 455 U.S. at 522 ("[A] district court *must* dismiss habeas petitions containing both unexhausted and exhausted claims.")

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[1]The facts in this section are substantially similar to the facts set forth in the state court records and the magistrate judge's report and recommendation. *See Commonwealth v. Fugah*, No. 3362 EDA 2001 (Pa. Super. Ct. June 6, 2001); *Fugah v. Mazurkiewicz, et al.*, No. 96-7272, 2004 WL 2958439 (E.D. Pa. Dec. 20, 2004).

[2]Pursuant to the "prison mailbox rule," the petition is considered filed on the day that petitioner delivered it to prison officials for mailing to the district court. *See Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998). Petitioner signed his original petition on October 23, 1996, but it was not filed with this court until October 28.

[3]Petitioner does not dispute that his original petition was "mixed.

(emphasis added). In my opinion, I instructed petitioner that he could "'return[] to state court to exhaust his claims or amend[] or resubmit[] . . . [his] habeas petition to present only exhausted claims.'" *Id*. (quoting *Rose*, 455 U.S. at 518). I advised petitioner that if he resubmitted his exhausted claims, "the court [would] then address the exhausted claims on the merits." *Id*. However, I cautioned petitioner that "'a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions.'" *Id*. at *21–22 (quoting *Rose*, 455 U.S. at 521). By the time I dismissed petitioner's initial petition, his time to file a federal habeas petition under the one-year statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d), had elapsed.

Next, instead of immediately returning to state court to exhaust his unexhausted claims, or proceeding solely with his exhausted claims, petitioner continued to seek redress in federal court. On December 31, 1997, petitioner filed a motion for reconsideration with this court,[4] which I denied on January 27, 1998. On February 27, 1998, petitioner sought a certificate of appealability. I denied petitioner's request on March 26, 1998, and the Third Circuit did the same on November 25, 1998. Two months later, petitioner filed a petition for writ of certiorari with the United States Supreme Court, which was denied on June 14, 1999, but not filed with the Third Circuit until July 8, 1999. *See Fugah v. Meyers*, 527 U.S. 1010 (1999). On August 2, 1999, petitioner filed a motion to recall mandate and for reconsideration of the Third Circuit's decision with the Third Circuit, which was denied by that court on October 6, 1999.

[4]Petitioner's alleged grounds for reconsideration were unrelated to the issues he raises herein.

On March 29, 2000, over two years after I dismissed petitioner's original petition and nearly six months after petitioner's final motion in federal court was denied, petitioner filed a *pro se* petition for post conviction collateral relief in state court under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. § 9541, *et seq*. The PCRA court appointed counsel and counsel filed a "no merit letter." On October 4, 2001, the PCRA court denied the petition as untimely pursuant to 42 Pa. Cons. Stat. § 9545(b), which imposes a one-year statute of limitations on PCRA petitions. *Commonwealth v. Fugah*, No. 9303-3950, slip op. at 5 (C.P. Phila. Cty. Mar. 11, 2002). On June 6, 2003, the Superior Court affirmed the PCRA court and denied the petition as untimely under Pennsylvania law as it existed at the time. *See Commonwealth v. Fugah*, No. 3362 EDA 2001, slip op. at 7 (Pa. Super. Ct. June 6, 2003). Petitioner did not seek *allocatur* review with the Pennsylvania Supreme Court.

On August 20, 2003, at the earliest,[5] petitioner filed a Rule 60(b)(6) motion in this court. On September 24, 2003, he filed a motion for appointment of counsel, which I granted. On January 14, 2004, through counsel, petitioner filed the instant amended Rule 60(b)(6) motion and amended petition for writ of habeas corpus. Petitioner requests that the court "reinstate [his] initial habeas petition" and "allow [p]etitioner to amend this petition *nunc pro tunc*." (Mem. of Law in Supp. of Pet'r's Am. Rule 60(b)(6) Mot. at 6.) The Commonwealth filed a response urging the court to dismiss the amended petition as untimely pursuant to AEDPA's statute of limitations.

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[5]Again, under the "prison mailbox rule," I will consider petitioner's motion filed on August 20, 2003, the day he signed the motion, even though the motion was not filed with this court until August 22, 2003. *See Burns*, 134 F.3d at 113.

The magistrate judge filed a report and recommendation on December 21, 2004. *See Fugah v. Mazurkiewicz, et al.*, No. 96-7272, 2004 WL 2958439 (E.D. Pa. Dec. 20, 2004). She concluded that the amended petition is time barred under AEDPA's statute of limitations. *Id*. at *3. The magistrate judge concluded that there was no basis for equitable tolling because she found that petitioner failed to demonstrate that he "exercised reasonable diligence" in filing his PCRA petition or refiling his claims in federal court. *Id*. at *4. Additionally, she found that this court's original decision did not mislead petitioner in any way because a reasonable person would not understand the opinion to permit a petitioner to wait more than two years to file his claims in state court and thus he was not prevented in some extraordinary way from asserting his rights. *Id*. at *5.

The magistrate judge also recommended that I dismiss petitioner's amended 60(b)(6) motion. She concluded that the motion was not filed within a "reasonable time" of this court's original dismissal order as required by Fed. R. Civ. P. 60(b)(6). *Id*. at *15. Alternatively, the magistrate judge concluded that petitioner failed to evidence "extraordinary circumstances" required for Rule 60(b)(6) relief because of his delay in exhausting his claims in state court. *Id*. at *21.

On January 11, 2005, petitioner filed objections to the magistrate judge's report and recommendation. Petitioner opposes the magistrate judge's characterization of his efforts to file timely petitions in state and federal court. (Objections at 3.) He asserts that he diligently appealed this court's original order in federal court and never waited longer than four months to respond to an order in the course of his state and federal habeas proceedings. (*Id*. at 4.) Additionally, petitioner contends that although the court was not required to stay petitioner's

original habeas petition at the time, the court should retroactively stay his dismissed original petition under Rule 60(b)(6) or the doctrine of equitable tolling. (*Id*. at 8.) Further, petitioner argues that this court's language, cautioning petitioner that if he set aside his unexhausted claims they could be dismissed in subsequent petitions, misled petitioner to believe that if he withdrew his claims and exhausted them in state court, a federal court would eventually hear them.[6] (*Id*. at 7.)

II. STANDARD OF REVIEW

Where a habeas petition has been referred to a magistrate judge for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B), this court reviews "those portions of the report or specified proposed findings or recommendations to which objection is made" *de novo*. *Id.* at § 636(b). After conducting this review, I "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." *Id.*

III. DISCUSSION

A. "Mixed" habeas petitions, AEDPA's statute of limitations, and *Crews v. Horn*

This case illustrates one of the procedural complexities created by AEDPA's one-year statute of limitations.[7] Long before AEDPA, federal courts required petitioners to exhaust their

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[6]Petitioner actually focuses on the exact same language from the magistrate judge's August 7, 1997 report and recommendation. Nonetheless, because I used this language in my opinion adopting the report and recommendation, I will focus on my opinion.

[7]AEDPA governs all §2254 petitions filed on or after April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997).

claims in state court before seeking habeas relief in federal court. *See Ex parte Hawk*, 321 U.S. 114, 116–17 (1944); *see also* 28 U.S.C. § 2254(b)(1)(A) (codifying the exhaustion requirement). In 1982, in *Rose v. Lundy*, the Supreme Court held that when a petitioner files a "mixed" petition, which contains exhausted and unexhausted claims, district courts "must dismiss" the petition without prejudice so that the petitioner can return to state court to exhaust the unexhausted claims. 455 U.S. at 522. Fourteen years later, Congress enacted AEDPA, which imposes a one-year statute of limitations on federal habeas petitions. 28 U.S.C. § 2244(d)(1). The statute of limitations created an additional barrier for petitioners who file timely "mixed" petitions. Because AEDPA's statute of limitations is not tolled when a habeas petition is pending in federal court, *see Jones v. Morton*, 195 F.3d 153, 158 (3d Cir. 1999), if a petitioner files a timely "mixed" petition, his limitations period will likely expire by the time the district court dismisses the petition, and the petitioner returns to state court to exhaust his claims and re-files in federal court. *Rhines v. Weber*, No. 03-9046, 2005 U.S. LEXIS 2930, at *11–*12 (Mar. 30, 2005); *Pliler v. Ford*, 124 S. Ct. 2441, 2445 (2004).

In 2004, in light of AEDPA's statute of limitations, the Third Circuit reconsidered the mechanisms for handling "mixed" petitions in *Crews v. Horn*, 360 F.3d 146. The court joined six other circuit courts of appeal and held that "district courts have the discretion to stay mixed habeas corpus petitions but . . . when an outright dismissal could jeopardize the timeliness of a collateral attack, a stay is the only appropriate course of action." *Id*. at 154.[8] The court also set

[8]On March 30, 2005, in *Rhines v. Weber*, No. 03-2930, 2005 U.S. LEXIS 2930, at *10, 17–*18 (2005), the Supreme Court confirmed that it had previously directed district courts to "dismiss[] mixed petitions without prejudice," but that district courts would now have discretion to stay "mixed" habeas petitions. The Court held that district courts "should stay, rather than

forth time-limits to prevent abuse of this stay and abeyance procedure:

> If a habeas petition is stayed, the petitioner should be given a reasonable interval, normally 30 days, to file his application for state post-conviction relief, and another reasonable interval after the denial of that relief to return to federal court. If petitioner fails to meet either time-limit, the stay should be vacated *nunc pro tunc*.

Id. *See also Rhines*, 2005 U.S. LEXIS 2930, at *16 ("Without time limits, petitioners could frustrate AEDPA's goal of finality by dragging out indefinitely their federal habeas review.") Prior to *Crews*, there was no indication that district courts could stay "mixed" petitions to save them from AEDPA's time bar. *See Slutzker v. Johnson*, 393 F.3d 373, 383 (3d Cir. 2004) ("[B]efore *Crews*, or at least [*Merritt v. Blaine*, 326 F.3d 157 (3d Cir. 2003)], there was no Supreme Court or Third Circuit precedent approving this procedure.") Indeed, Supreme Court jurisprudence was to the contrary -district courts were required to dismiss "mixed" petitions. *See Rose*, 455 U.S. at 522.

Since *Crews* and analogous decisions in other circuits, a number of habeas petitioners whose timely "mixed" petitions were dismissed have asked district courts to issue retroactive stays for their original petitions to avoid AEDPA's time bar. Courts have sometimes afforded petitioners such relief under two theories. Some courts have reopened the initial dismissed habeas proceeding under Federal Rule of Civil Procedure 60(b)(6). *See Johnson v. Lehman*, No. 94-7583, 2004 U.S. Dist. LEXIS 11221, at *11 (E.D. Pa. June 15, 2004); *Figueroa v. Fischer*, No. 99-2392, 2003 Dist. LEXIS 4993, at * 23 (S.D.N.Y. Mar. 31, 2003); *Devino v. Duncan*, 215

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dismiss, mixed petitions" "if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics."

F. Supp. 2d 414, 419 (S.D.N.Y. 2002).[9] Others have reached the same result by equitably tolling AEDPA's statute of limitations. *See Figueroa*, 2003 U.S. Dist. LEXIS 4993, at *15; *Jimenez v. Walker*, 166 F. Supp. 2d 765, 772 (E.D.N.Y. 2001); *cf. Devino*, 215 F. Supp. 2d at 419 n.6 ("If Rule 60(b) relief were not available, this would be an appropriate case for equitable tolling."). However, courts applying either theory have uniformly required that the petitioners diligently pursue their unexhausted claims in state court and promptly return to federal court. *See Amante v. Walker*, 268 F. Supp. 2d 154, 157 (E.D.N.Y. 2003) ("Since petitioner in this case did not timely pursue state remedies, waiting eight months after dismissal of his first federal habeas corpus petition to file his papers with [state court], I decline to apply the provisions of Rule 60(b) to petitioner's previously filed habeas corpus application."); *Youngblood v. Greiner*, No. 00-7984, 2002 U.S. Dist. LEXIS 25504, at *18 (S.D.N.Y. Oct. 2, 2002) (report and recommendation adopted by *Youngblood v. Greiner*, No. 00-7984, 2003 U.S. Dist LEXIS 683 (S.D.N.Y. Jan. 17,

[9]There is an important distinction between the cases arising out of the Second Circuit and this case. Before 2001, the law in the Second Circuit tolled AEDPA's statute of limitations during the pendency of a federal habeas petition. *See Walker v. Artuz*, 208 F.3d 357, 260 (2d Cir. 2000). Hence, when courts in the Second Circuit dismissed "mixed" habeas petitions, petitioners believed that their limitations period would be tolled during their federal proceedings. However, in 2001, when the Supreme Court held that the statute of limitations was not tolled during a federal habeas proceeding, *see Duncan v. Walker*, 533 U.S. 167, many petitioners in the Second Circuit, who relied on the Second Circuit's earlier interpretation of AEDPA, saw their petitions become time barred. In contrast, in the Third Circuit, at the time that petitioner filed his original petition, there was no law indicating whether AEDPA's statute of limitations was tolled while a petition is pending in federal court. *See Jones*, 195 F.3d at 158 (observing in 1999 that "[t]his issue appears to be one of first impression [in the Third Circuit]" and concluding that "the statute of limitations is not tolled under § 2244(d)(2) for the time during which a habeas petition is pending in federal court.") Hence, unlike petitioners in the Second Circuit, petitioner did not rely on a court's mistaken interpretation of AEDPA. Nonetheless, because this court's dismissal of petitioner's original petition ensured that petitioner could not re-file within the limitations period, petitioner has an arguable basis for equitable tolling. *See Johnson*, 2004 U.S. Dist LEXIS 11221, at *11.

2003)) ("[W]here the petitioner has not been diligent in either exhausting his state claims or in returning to federal court after the conclusion of state proceedings, the renewed petition has been found untimely."); *Baity v. Mazucca*, No. 00-8823, 2002 U.S. Dist. LEXIS 1065, at * 13 (S.D.N.Y, Jan. 23, 2002) (refusing to equitably toll the petitioner's statute of limitations because he waited eleven and a half months after his original petition was dismissed to file a state habeas petition, and sixteen months to return to federal court).

B. Equitable tolling

Petitioner does not dispute that his petition and amended petition are untimely under AEDPA's statute of limitations.[10] Nonetheless, he contends that he is entitled to equitable tolling because under current law, the court should have stayed his original habeas petition instead of dismissing it without prejudice. *See Crews*, 360 F.3d at 154. Courts will equitably toll AEDPA's statute of limitations only when "'principles of equity would make [the] rigid

[10]Because petitioner was convicted before the effective date of AEDPA, he had until April 24, 1997 to file a federal habeas petition. *See Burns v. Morton*, 134 F.3d 109, 111 (3d Cir. 1998). Petitioner filed his original federal petition on October 23, 1996. While this petition was timely, it did not toll petitioner's limitations period. *See Jones*, 195 F.3d at 158 ("[T]he statute of limitations is not tolled under § 2244(d)(2) for the time during which a habeas petition is pending in federal court."); *see also Hull v. Kyler*, 190 F.3d 88, 103–04 ("Typically, when a complaint (or habeas petition) is dismissed without prejudice, that complaint or petition is treated as if it never existed."). Petitioner's PCRA petition, which was pending from March 29, 2000 to June 6, 2003, did not affect his AEDPA statute of limitations because the state court determined that it was untimely. *See Fahy v. Horn*, 240 F.3d 239, 243 (3d Cir. 2001) ("The AEDPA statute of limitations can only be statutorily tolled when a collateral petition for state relief was 'submitted according to the state's procedural requirements, such as the rules governing the time and place of filing.") (citation omitted); *see also* 28 U.S.C. § 2244(d)(2). Hence, petitioner's time to file a federal habeas petition expired on April 24, 1997, before this court dismissed petitioner's original petition without prejudice. Petitioner filed this amended petition on January 14, 2004, more than six years and eight months after his limitations period had elapsed.

application [of a limitation period] unfair.'" *Miller v. New Jersey State Dept. of Corrections*, 145 F.3d 616, 618 (3d Cir. 1998) (alteration in original) (citation omitted). Generally, this will only occur (1) "when the petitioner has in some extraordinary way been prevented from asserting his or her rights;" and (2) if the petitioner has shown that "he or she exercised reasonable diligence in investigating and bringing the claims." *Id*. at 618–19 (citations omitted).

As I described above, district courts in other circuits have determined that when a court caused a petitioner to file an untimely federal habeas petition because the court dismissed the petitioner's original "mixed" petition, the petitioner is entitled to equitable tolling that would amount to a retroactive stay of the original petition. *See Figueroa*, 2003 U.S. Dist. LEXIS 4993, at *15; *Jimenez*, 166 F. Supp. 2d at 772. When I dismissed petitioner's original petition on December 12, 1997, he was automatically foreclosed from returning to federal court under case law as it exists today because his AEDPA limitations period had already elapsed. Nonetheless, despite this apparent inequity, petitioner is not entitled to equitable tolling because he failed to "exercise reasonable diligence" in exhausting his claims in state court. *See Miller*, 145 F.3d at 618.

Petitioner contends that he "exercised reasonable diligence" because from December 12, 1997, the day that I dismissed his original petition without prejudice, to October 6, 1999, the day that the Third Circuit dismissed his motion to recall mandate, he filed a number of motions and appeals in federal court.[11] However, even if I granted petitioner credit for all of this time, he

[11]After I dismissed petitioner's original petition on December 12, 1997, petitioner filed a motion for reconsideration on December 31, 1997, which I denied on January 27, 1998. Next, petitioner filed a request for a certificate of appealability on February 27, 1998, which I denied on

waited over nine months after the Supreme Court denied his petition for writ of certiorari and almost six months after the Third Circuit denied his motion to recall mandate and for reconsideration to file a PCRA petition in state court. Petitioner's diligent pursuit of relief in federal court does not excuse his failure to diligently file in state court, which he could have done concurrently. Under current law, if a court stays a timely "mixed" habeas petition, the petitioner must return to state court to exhaust his claims within "a reasonable interval, normally 30 days." *Crews*, 360 F.3d at 154; *see also Rhines*, 2005 U.S. LEXIS 2930, at *16 ("Without time limits, petitioners could frustrate AEDPA's goal of finality by dragging out indefinitely their federal habeas review.") Here, petitioner failed to file in state court while his federal appeals were pending and waited nearly six months after his final federal motion was decided to file a PCRA petition. Thus, petitioner failed to return to state court within a period that even approaches *Crews* thirty-day time-limit and petitioner has failed to show that his efforts meet any other definition of reasonable diligence. Hence, even if *Crews* had applied at the time, and I stayed petitioner's original "mixed" petition, I would have been forced to vacate the stay for failure to return to state court within a "reasonable interval." *Id*. Further, petitioner's failure to diligently file in state court is all the more glaring because nothing prevented him from filing a PCRA

March 26, 1998, and the Third Circuit denied on November 30, 1998. Two months later, petitioner filed a petition for writ of certiorari with the United States Supreme Court, which was denied on June 14, 1999. Finally, on August 2, 1999, petitioner filed a motion to recall mandate and for reconsideration of the Third Circuit's decision, which was denied by the Third Circuit on October 6, 1999. Petitioner filed his PCRA petition on March 29, 2000, nearly six months after his final motion in federal court was denied.

petition over the nearly two years his federal appeals were pending.[12]

Petitioner also argues that he is entitled to equitable tolling because this court "actively misled" him when it cautioned him against refiling his petition without his unexhausted claims. (Objections at 7.) The Third Circuit has explained that "equitable tolling 'may be appropriate if the defendant has actively misled the plaintiff . . . .'" *Jones v. Morton*, 195 F.3d 153, 159 (3d Cir. 1999) (citation omitted); *see also Pliler*, 124 S. Ct. 2448 (O'Connor J., concurring) ("[I]f the petitioner is affirmatively misled, either by the court or by the State, equitable tolling might well be appropriate.")

I cannot say that my earlier language "affirmatively misled" petitioner. The cautionary language that petitioner faults was taken directly from the Supreme Court's opinion in *Rose*. *See Fugah*, 1997 U.S. Dist. LEXIS, at *21. In *Pliler*, which was decided on June 21, 2004, the Supreme Court confirmed that *Rose* remains good law despite AEDPA's statute of limitations. 124 S. Ct. at 2445. Additionally, to this day, courts continue to cite this language with approval. *See Slack v. McDaniel*, 529 U.S. 473, 487 (2000); *Isaac v. Dretke*, No. 04-0563, 2004 U.S. Dist. LEXIS 1932, at *6 (N.D. Tex. Sept. 27, 2004) (report and recommendation adopted on Nov. 16, 2004 without an opinion); *Brown v. McCaughtry*, No. 04-405, 2004 U.S. Dist. LEXIS 12269, at *6 (W.D. Wis. June 30, 2004). Moreover, a unanimous panel of the Third Circuit affirmed the

[12]Had petitioner returned to state court in early 1998, he might well have been able to secure a merits review of his claim because the state courts were not rigidly enforcing the state's statute of limitations at that time and did not until March 2, 1999 when *Commonwealth v. Banks*, 726 A.2d 374 (1999), was decided. *See Fahy v. Horn*, 240 F.3d 239, 245 (3d Cir. 2001) ("[T]he Pennsylvania Supreme Court did not clarify that the state PCRA statute was jurisdictional and not waivable until 1999 in *Commonwealth v. Banks*.") (citation omitted).

decision, the Supreme Court denied certiorari, and the Third Circuit thereafter denied petitioner's motion to recall mandate. Finally, petitioner's argument is unconvincing because no reasonable person would understand this language to permit a petitioner to wait more than two years after the order and nearly six months after the petitioner's final federal appeal before returning to state court to exhaust his claims.

Petitioner also claims that the phrase "without prejudice" misled him. (Objections 7; Am. App. for Rule 60(b)(6) Relief at 5.) Again, no reasonable person would understand this standard language, which is common in legal memoranda, to permit a petitioner to wait more than two years (or six months) before returning to state court to exhaust his claims. *See United States ex rel. Love v. Trancoso*, No. 03-5249, 2004 U.S. Dist LEXIS 14277, at *8 (N.D. Ill. July 22, 2004) ("[I]t is doubtful that a reasonable person would understand the phrase 'without prejudice to refiling,' which relates only to the *ability* to re-file a habeas petition, as indefinitely extending the *time* for refiling such a petition.") (emphasis in original). Hence, petitioner has failed to show that he was "affirmatively misled" by this court and consequently, I will adopt the magistrate judge's opinion, and decline to equitably toll petitioner's statute of limitations.[13]

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[13]Petitioner also argues that *Pace v. Vaughn*, 71 Fed. Appx. 127 (3d Cir. 2003), which the Supreme Court recently agreed to review on writ of certiorari, *see Pace v. DiGuglielmo*, 125 S. Ct. 25, somehow governs this case. In *Pace*, the district court held that the petitioner's PCRA petition was "properly filed" within the meaning of AEDPA and that the petitioner was thus entitled to statutory tolling for the period when his PCRA petition was pending, *see* 28 U.S.C. § 2244(d)(2), where the PCRA court accepted the petition and ruled on the merits, but the Pennsylvania Superior Court subsequently dismissed the petitioner as time barred. *Pace v. Vaughn*, 151 F. Supp. 2d 586, 591–92 (E.D. Pa. 2001). The district court also held that the petitioner was entitled to equitable tolling because the petitioner could not bring a federal habeas petition while his PCRA petition was pending since it was unclear at the time whether the Pennsylvania courts would apply the PCRA's statute of limitations. *Id*. at 594–95. The Third

C. Rule 60(b)(6)

Alternatively, petitioner argues that the court should modify its earlier order and reinstate petitioner's original petition pursuant to Federal Rule of Civil Procedure 60(b)(6). Before I may consider petitioner's amended Rule 60(b) motion, I must determine whether it should be treated as a second or successive habeas petition. Under AEDPA, petitioners seeking to present a second or successive habeas petition in district court must first file for authorization to do so in the appropriate court of appeals. 28 U.S.C. § 2244(b)(3)(A). In *Pridgen v. Shannon*, 380 F.3d 721, 727 (2004), the Third Circuit decided when a Rule 60(b) motion seeking to reopen a judgment denying habeas relief is properly considered a second or successive habeas petition. The court held that,

> in those instances in which the factual predicate of a petitioner's Rule 60(b) motion attacks the manner in which the earlier habeas judgment was procured and not the underlying conviction, the Rule 60(b) motion may be adjudicated on the merits. However, when the Rule 60(b) motion seeks to collaterally attack the petitioner's underlying conviction, the motion should be treated as a successive habeas petition.

Id. Here, petitioner attacks the legitimacy of his earlier habeas proceeding, not his underlying conviction. Hence, I need not treat his amended Rule 60(b) motion as a second or successive

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Circuit reversed in a non-precedential opinion. *See* 71 Fed. Appx. at 129. The court reasoned that the petitioner was not entitled to statutory tolling because the highest state court held that the PCRA petition was untimely, *id*. at 128, and petitioner was not entitled to equitable tolling because "lack of certainty as to how Pennsylvania courts would interpret the PCRA is not an 'extraordinary' circumstance," which justifies equitable relief. *Id*. at 129.

Petitioner's reliance on *Pace* is misplaced. Petitioner argues that like the petitioner in *Pace* he is entitled to statutory or equitable tolling because he relied on this court's interpretation of AEDPA's filing requirements. In *Pace*, the petitioner's reliance on a court's interpretation of the law was not at issue. Additionally, in *Pace* the court focused on the PCRA's procedural rules, not AEDPA's. Moreover, the district court's opinion has no persuasive value because it was reversed on appeal by the Third Circuit. Whether the Supreme Court will alter the law in this area remains to be seen.

habeas petition, and I may reach its merits.

Rule 60(b)(6) provides that a "court may relieve a party or a party's legal representative from a final judgment, order or proceeding . . . for any . . . reason justifying relief from operation of a judgment."[14] "Relief under Rule 60(b)(6) 'is available only in cases evidencing extraordinary circumstances.'" *Reform Party v. Allegheny County Dept. of Elections*, 174 F.3d 305, 311 (3d Cir. 1999) (en banc) (citations omitted). "'[I]ntervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6).'" *Morris v. Horn*, 187 F.3d 333, 341 (3d Cir. 1999) (quoting *Agostini v. Felton*, 521 U.S. 203, 239 (1997)). However, "'in the exceptional case . . . an action may be reinstated on account of an intervening change in the law.'" *Harper v . Vaughn*, 272 F. Supp. 2d 527, 532 (E.D. Pa. 2003) (citation omitted); *see also Devino*, 215 F. Supp. 2d at 417 ("[A] 'supervening change in governing law that calls into serious question the correctness of the court's judgment' may constitute an extraordinary circumstance justifying relief . . . .") (quoting *Sargent v. Columbia Forest Prod., Inc.*, 75 F.3d 86, 90 (2d Cir. 1996)). Rule 60(b)(6) motions must be made "within a reasonable time" after entry of the judgment from which relief is sought. Fed. R. Civ. P. 60(b)(6).

As I described above, some district courts have determined that habeas petitioners are entitled to Rule 60(b)(6) relief where the court caused a petitioner to file an untimely § 2254 petition because the court dismissed the petitioner's original timely "mixed" petition. *See*

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[14]Rule 60(b)(6) is known as "the catch-all" provision. Rules 60(b)(1) through (5) enumerate specific reasons why a court may overturn a final judgment, including "excusable neglect," "newly discovered evidence," and "fraud."

Johnson, 2004 U.S. Dist. LEXIS 11221, at *11; *Figueroa*, 2003 Dist. LEXIS 4993, at * 23; *Devino*, 215 F. Supp. 2d at 419. Before granting such relief, these courts have required that the petitioner diligently brought his claims in state court. *Compare Amante*, 268 F. Supp. 2d at 157 (E.D.N.Y. 2003) ("Since petitioner in this case did not timely pursue state remedies, waiting eight months after dismissal of his first federal habeas corpus petition to file his papers with [state court], I decline to apply the provisions of Rule 60(b) to petitioner's previously filed habeas corpus application."), *and Reid v. Marshall*, No. 98-11514, 2001 U.S. Dist. LEXIS 22177, *13 (D. Mass. Nov. 6, 2001) (report and recommendation adopted on Nov. 21, 2001 without an opinion) (refusing to grant the petitioner's Rule 60(b) motion where the "petitioner [was] partly at fault for his predicament" because "he chose to await the result of his first appeal to the First Circuit rather than also file [in state court] during the pendency of that appeal . . . ."), *with Johnson*, 2004 U.S. Dist. LEXIS 11221, at *2, *11 (granting Rule 60(b)(6) relief where petitioner filed a state petition for post-conviction collateral relief four months *before* the district court dismissed his "mixed" petition without prejudice), *and Figueroa*, 2003 U.S. Dist. 4993, at *23 (finding the petitioner's previously dismissed petition timely under Rule 60(b)(6) partially because the petitioner "was reasonably diligent throughout his post-conviction challenges."), *and Devino*, 215 F. Supp. 2d at 418 (granting relief under Rule 60(b)(6) where petitioner filed in state court thirty-three days after his original federal petition was dismissed, and returned to federal court thirteen days after the conclusion of his state court proceedings).

Here, because petitioner waited more than two years after I dismissed his petition and nearly six months after the conclusion of his federal proceedings to return to state court, I

conclude that petitioner has failed to show the "extraordinary circumstances" required to reopen a judgment under Rule 60(b)(6).[15, 16] *See* Part III.B.

IV. CONCLUSION

For the foregoing reasons, I will overrule petitioner's objections, adopt the report and recommendation, and deny the amended petition for writ of habeas corpus and the amended application for Rule 60(b)(6) relief. An appropriate order follows.

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[15]In petitioner's brief in support of his amended Rule 60(b)(6) motion, he contends that his original petition should be reopened because the court failed to warn him that AEDPA's statute of limitations had elapsed by the time the court dismissed his original petition. (Mem. of Law in Supp. of Pet'r's Am. Rule 60(b)(6) Mot. at 3.) Recently, in *Pliler v. Ford*, 124 S. Ct. 2441, 2446 (2004), the Supreme Court decided that federal district judges are not required to give *pro se* litigants warnings about AEDPA's statute of limitations before dismissing "mixed" habeas petitions. Hence, this court's failure to warn petitioner about the statute of limitations was not an "exceptional circumstance" that would justify Rule 60(b)(6) relief.

[16]Because I conclude that petitioner's circumstances do not justify Rule 60(b)(6) relief, I need not determine whether petitioner filed his motion "within a reasonable time." Fed. R. Civ. P. 60(b)(6).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TITUS FUGAH, Petitioner,	:	
v.	:	CIVIL ACTION
J.F. MAZURKIEWICZ, and THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA, and THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Respondents.	:	NO. 96-7272

ORDER

YOHN, J. April ____, 2005

And now on this _____ day of April 2005, upon careful and independent consideration of Titus Fugah's amended application for relief pursuant to Federal Rule of Civil Procedure 60(b)(6) (Doc. No. 33), his amended petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 (Doc. No. 34), the Report and Recommendation of United States Magistrate Diane M. Welsh (Doc. No. 40), and Fugah's objections thereto (Doc. No. 41), and for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

1. Petitioner's objections are OVERRULED;

2. The magistrate judge's report and recommendation is APPROVED and ADOPTED as supplemented herein;

3. The amended petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 is DENIED;

4. The motion and amended motion under Rule 60(b)(6) motion are DENIED;

5. The petitioner having failed to make a substantial showing of the denial of a constitutional right, there is no ground to issue a certificate of appealability, *see* 28 U.S.C. § 2253(c); and

6. The Clerk shall CLOSE this case statistically.

_____

William H. Yohn, Jr., J.